

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

NORTHERN NEW MEXICO
STOCKMAN'S ASSOCIATION and
OTERO COUNTY CATTLEMAN'S
ASSOCIATION,

Petitioners,

v.

UNITED STATES FISH AND WILDLIFE
SERVICE and MARGARET EVERSON,
in her official capacity as Principal
Deputy Director of the United States
Fish and Wildlife Service,

Respondents.

Case No. 1:18-cv-01138-SCY-JHR

**JOINT MOTION FOR A
SCHEDULING ORDER**

The United States Fish and Wildlife Service ("Service") and Margaret Everson, in her official capacity as Principal Deputy Director of the Service, (collectively, "Respondents") and the Northern New Mexico Stockman's Association and Otero County Cattleman's Association (collectively, "Petitioners") hereby move for a scheduling order in the above captioned case.

Petitioners filed their Petition for Review and Complaint for Declaratory and Injunctive Relief on December 6, 2018. ECF No. 1. Petitioners allege that the Service's final rule designating critical habitat for the endangered New Mexico Meadow Jumping Mouse violates the Endangered Species Act, 16 U.S.C. §§ 1531-1544, and Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. ECF No. 1.

Respondents and Petitioners have conferred and agree that this Court's review of the Service's final rule is treated as an appellate proceeding under Tenth Circuit

precedent. See, e.g., *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1580 (10th Cir. 1994) (“A district court is not exclusively a trial court. . . . [I]t must sometimes act as an appellate court. Reviews of agency action in the district courts must be processed as *appeals*. In such circumstances the district court should govern itself by referring to the Federal Rules of Appellate Procedure,” which “are conceptually incompatible” with Answers, “[m]otions to affirm[,] and motions for summary judgment.”).¹ Accordingly, Respondents are excused from filing an Answer.² The parties also agree that the Court’s review will be based upon the record that was before the agency, pursuant to the Administrative Procedure Act, 5 U.S.C. § 706,³ and therefore the case is exempt from the requirements of Federal Rule of Civil Procedure 26. See Fed. R. Civ. P. 26(a)(1)(B)(i), (f)(1) (“an action for review on an administrative record” is exempt from initial disclosures and the Rule 26 conference).

The parties propose the following schedule for the production of the administrative record and merits briefing:

¹ Petitioners and Plaintiffs do not concede that *Olenhouse* is a correct interpretation of the Administrative Procedure Act, and reserve the right to challenge the decision. See, e.g., Sam Kalen, *Federal Administrative Procedure Act Claims: The Tenth Circuit and the Wyoming District Court Should Fix the Confusion Attendant with Local Rule 83.7.2*, 11 Wyo. L. Rev. 513 (2011). However, Petitioners and Plaintiffs recognize that this Court is bound by Tenth Circuit precedent and, in the interest of judicial economy, consent to the proposed briefing schedule.

² On February 14, 2019, Respondents filed a Notice regarding the deadline to answer or otherwise respond to the Complaint. ECF No. 9. Upon further review, Respondents have now concluded that an Answer is not required, pursuant to the framework established in *Olenhouse* for petitions for review of agency action in the Tenth Circuit.

³ This Court may consider limited extra-record evidence if necessary to establish Petitioners’ standing. See, e.g., *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 696 n.13 (10th Cir. 2009).

1. On or before June 7, 2019, Respondents shall serve a copy of the administrative record upon Petitioners in electronic format.
2. On or before June 21, 2019, Petitioners shall notify Respondents whether they agree that the administrative record is complete or, instead, propose any changes or additions to the record. The parties shall confer in good faith and attempt to resolve informally any disputes regarding the contents of the administrative record.
3. On or before June 28, 2019, the parties shall file a joint status report notifying the Court whether they have reached agreement that the record is complete. If Petitioners intend to file a record motion, the joint status report will propose a briefing schedule for such a motion.
4. If the parties agree that the record is complete, Respondents shall lodge a copy of the administrative record with the Court on or before July 8, 2019, and proceed to merits briefing as follows:
 - a. On or before August 8, 2019, Petitioners shall file their Opening Brief in support of their Petition for Review.
 - b. On or before September 9, 2019, Respondents shall file their Response Brief.
 - c. On or before September 30, 2019, Petitioners shall file their Reply Brief.

The parties respectfully request that the Court grant this motion and set the proposed deadlines in the above-captioned case.

Dated March 27, 2019.

Respectfully Submitted by

JOHN C. ANDERSON
United States Attorney

MANUEL LUCERO
Assistant United States Attorney
P.O. Box 607
Albuquerque, NM 87103
(505) 224-1467
manny.lucero@usdoj.gov

JEAN E. WILLIAMS,
Deputy Assistant Attorney General
SETH M. BARSKY, Chief
MEREDITH L. FLAX, Assistant Chief

/s/ Devon Lea Flanagan
DEVON LEA FLANAGAN, Trial Attorney
DC Bar No. 1022195
U.S. Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section
Ben Franklin Station, P.O. Box 7611
Washington, D.C. 20044-7611
Telephone: (202) 305-0201
Facsimile: (202) 305-0275
Email: devon.flanagan@usdoj.gov

Attorneys for Respondents

A. BLAIR DUNN
Western Agriculture, Resource and Business
Advocates, LLP
400 Gold Ave. SW, Suite 1000
Albuquerque, New Mexico 87102
Telephone: (505) 750-3060
Email: abdunn@ablairdunn-esq.com

s/ Jeffrey W. McCoy
JEFFREY W. McCOY
ANTHONY L. FRANÇOIS
DAMIEN M. SCHIFF

Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Email: tfrancois@pacificlegal.org
Email: dschiff@pacificlegal.org
Email: jmccoy@pacificlegal.org

Attorneys for Petitioners and Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 27, 2019, I filed the foregoing motion electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

A. Blair Dunn
Attorney for Petitioners
abdunn@ablairdunn-esq.com

Damien M. Schiff
Attorney for Petitioners
Dms@pacificlegal.org

Jeffrey McCoy
Attorney for Petitioners
Jmccoy@pacificlegal.org

Anthony L. Francois
Attorney for Petitioners
Alf@pacificlegal.org

/s/ Devon Lea Flanagan
DEVON LEA FLANAGAN

Attorney for Respondents